IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.698/2003

Reserved on.3.8.2007

Decided on. August 13, 2007

K.S. Sandhu. **…Petitioner.**

Versus

Union of India and others. **…Respondents**

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*.yes.*

For the petitioner : Mr. R.D. Kaundal, Advocate.

For the respondents Mr. Sandeep Sharma, Assistant Solicitor General of India.

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this petition are that the petitioner was appointed as an ACIO-II on 8th August, 1973 and was promoted as Company Commander in the month of October, 1978. He was further promoted as Deputy Commandant in the month of May, 1988 and was subsequently promoted as Second-in-Command in October, 1992 and promoted as Commandant in September, 1995. The petitioner was in feeder category for promotion to the post of Additional DIG as per the Indo-Tibetan Border Police Force, General Duty Cadre, Group-A, Recruitment Rules, 1999. The Departmental Promotion Committee was convened by the respondents on 11th March, 2003 for making promotions to the post of Additional DIG. The case of the petitioner was considered by the Departmental Promotion Committee but he was not found suitable. He made a representation to the respondent

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? yes.

No.2 on 17.4.2003. The representation made by him was rejected on 19th May, 2003.

Mr. R.D. Kaundal, Advocate had vehemently argued that the Departmental Promotion Committee while considering the case of the petitioner had not taken into consideration the ACRs for the year 2002-2003 while adjudicating his suitability. He had further contended that the persons junior to him had been promoted to the post of Additional DIG and accordingly the petitioner has been superseded.

Mr. Sandeep Sharma, Assistant Solicitor General of India had submitted that the Departmental Promotion Committee was convened in accordance with law and the petitioner was duly considered but he was not found suitable since he had failed to get the benchmark of "very good".

I have heard the learned counsel for the parties and perused the record.

The promotion to the post of Additional DIG is regulated under the rules called "Indo-Tibetan Border Police Force, General Duty Cadre, Group-A, Recruitment Rules, 1999. The petitioner was eligible to be considered for promotion to the post of Additional DIG since he had already put in the required service for being considered for the promotion. The Departmental Promotion Committee had met on 11th March, 2003.

Mr. Sandeep Sharma had produced the entire record for the perusal of the Court including the proceedings of the Departmental Promotion Committee which was convened on 11th March, 2003. I have gone through the proceedings of the Departmental Promotion Committee. The Departmental Promotion Committee had taken into consideration the ACRs of the petitioner upto 2001-02. The post in question is a selection post. The criteria for filling up the selection post is that the merit alone has to be taken into consideration. The petitioner had failed to achieve the

benchmark of “very good” on the basis of his ACRs. The Departmental Promotion Committee was required only to consider the ACRs upto one year prior to the conducting of Departmental Promotion Committee i.e. 11th March, 2003. The Departmental Promotion Committee could not consider the ACRs for the year 2002-03 since the same were to be initiated after 31st March, 2003.

The Apex Court in ***State Bank of India and others***, (1987) 4 SCC 486 have held that whenever promotion to a higher post is to be made on the basis of merit no officer can claim promotion to the higher post as a matter of right by virtue of seniority alone. Their Lordships have held as under:

> **“Whenever promotion to a higher post is to be made on the basis of merit no officer can claim promotion to the higher post as a matter of right by virtue of seniority alone with effect from the date on which his juniors are promoted. It is not sufficient that in his confidential reports it is recorded that his services are 'satisfactory'. An officer may be capable of discharging the duties of the post held by him satisfactorily but he may not be fit for the higher post. Before any such promotion can be effected it is the duty of the management to consider the case of the officer concerned on the basis of the relevant materials. If promotion has been denied arbitrarily or without any reason ordinarily the court can issue a direction to the management to consider the case of the officer concerned for promotion but it cannot issue a direction to promote the officer concerned to the higher post without giving an opportunity to the management to consider the question of promotion. There is good reason for taking this view. The court is not by its very nature competent to appreciate the abilities, qualities or attributes necessary for the task, office or duty of every kind of post in the modern world and it would be hazardous for it to undertake the responsibility of assessing whether a person is fit for being promoted to a higher post which is to be filled up by selection. The duties of such posts**

may need skills of different kinds - scientific, technical, financial, industrial, commercial, administrative, educational etc. The methods of evaluation of the abilities or the competence of persons to be selected for such posts have also become nowadays very much refined and sophisticated and such evaluation should, therefore, in the public interest ordinarily be left to be done by the individual or a committee consisting of persons who have the knowledge of the requirements of a given post, to be nominated by the employer. Of course, the process of selection adopted by them should always be honest and fair. It is only when the process of selection is vitiated on the ground of bias, mala fides or any other similar vitiating circumstances other considerations will arise. The nature of the writ that can be issued in cases like the one before us has been considered by this Court in the State of Mysore v. Syed Mahmood!. In that case Rule 43 (b) of the Mysore State Civil Services General Recruitment Rules, 1957 required promotion to be made by selection on the basis of seniority-cum-merit, that is seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion. While making selections for promotions to the post of senior statistical assistants from the cadre of junior statistical assistants, the State Government did not consider the case of the respondents therein who were junior statistical assistants, and published a list promoting persons ranking below them in point of seniority. The respondents therein filed writ petition before the High Court. The High Court while refusing to quash the seniority list directed the appellant-State to promote the respondents as from the dates on which their juniors were promoted and treat their promotion as effective from that date. In the appeal filed against the judgment of the High Court this Court observed that while making selections for promotion to the post of senior statistical assistants from the cadre of junior statistical assistants in 1959, the State Government was under a duty to consider whether having regard to their seniority and fitness they should be promoted. Since the promotions were irregularly made the respondents therein were entitled to ask

the State Government to reconsider their case. In the circumstances, this Court observed, that the High Court could only issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to their seniority and fitness, the respondents should have been promoted on the relevant dates when officers junior to them were promoted and that instead of issuing such a writ the High Court had wrongly issued a writ directing the State Government to promote them with retrospective effect. This Court further observed that the High Court ought not to have issued such a writ without giving the State Government an opportunity in the first instance to consider their fitness for promotion in 1959. The ratio of the above decision is that where the State Government or a statutory authority is under an obligation to promote an employee to a higher post which has to be filled up by selection the State Government or the statutory authority alone should be directed to consider the question whether the employee is entitled to be so promoted and that the court should not ordinarily issue a writ to the government or the statutory authority to promote an officer straightway. The principle enunciated in the above decision is equally applicable to the case in hand."

Again the Apex Court has held in ***Union Public Service Commission Versus Hiranyalal Dev and others,*** (1988) 2 SCC 242 that in case of a selection question of supersession by juniors does not arise. Their Lordships have held as under:

"**It cannot be gainsaid that the Selection Committee could not have taken into consideration the adverse remarks entered in the records which had not been communicated to respondent 1, and in any case could not have taken into consideration these remarks which were subsequently set aside by the State Government. The legal effect of the setting aside of the adverse remarks would be that the remarks must be treated as non-existent in the eye of law. The Selection Committee had" therefore, fallen in error in taking into account these adverse remarks which in the eye of law did not exist and which could**

not have been lawfully taken into consideration. However, the fact that the Selection Committee erred in this behalf does not necessarily mean that respondent 1 should have been categorized or considered as "very good' vis-a-vis others who were also in the field of choice. How to categorize in the light of the relevant records and what norms to apply in making the assessment are exclusively the functions of the Selection Committee. The Tribunal could not make a conjecture as to what the Selection Committee would have done or to resort to conjecture as to the norms to be applied for this purpose. The proper order for the Tribunal to pass under the circumstances was to direct the Selection Committee to reconsider the merits of respondent 1 vis-a-vis the official who was junior to him and whose name was Shri Sardar Pradeep Kar. Instead of doing so, the Tribunal has held that respondent 1 should be deemed to have been included in the impugned select list prepared in 1983, at least in the place in the order of his seniority on the basis of the assessment of his C. C. Rolls, and has issued a direction to appoint respondent 1 with effect from the date on which Shri Kar was appointed. The jurisdiction to make the selection vested in the Selection Committee. The Selection Committee had to make the selection by applying the same yardstick and norm as regards the rating to be given to the officials, who were in the Held of choice by categorizing the concerned officials as "outstanding", "very good", "good" etc. This function had also to be discharged by the Selection Committee by applying the same norm and tests and the selection was also to be made by the Selection Committee as per the relevant rules. The powers to make selection were vested unto the Selection Committee under the relevant rules and the Tribunal could not have played the role which the Selection Committee had to play. The Tribunal could not have substituted itself in place of the Selection Committee and made the selection as if the Tribunal itself was exercising the powers of the Selection Committee, as has been done which is evident from the passage extracted from paragraph 16 of the judgment:

We have also gone through the C. C. Roll, of the two junior officers, respondents 11 and 12 for the same period of five years including 1982-83. We are of the definite view that there is absolutely no reason after expunction of the adverse remarks to hold that the applicant deserved a lower classification than these two respondents, who were junior to him.

The proper course to adopt was the course which was indicated by this Court in Gurdial Singh Fijji v. State of Punjab1, wherein this Court directed that the case of the appellant be considered afresh by the Selection Committee indicating the broad framework within which the Committee should act and the preliminary steps the government should take in order to facilitate the Committee's task. In State of Mysore v. Syed Mahmood a dispute about promotion of certain officers had been raised. In writ petitions filed by the aggrieved officers the High Court passed orders directing the State Government to promote them from the respective dates on which respondents junior to them were promoted. The orders passed by the High Court were set aside by this Court and a direction was issued to the State Government to consider whether the said officers should have been promoted on the relevant dates. It was held:

The promotions were irregularly made and they were, therefore, entitled to ask the State Government to reconsider their case. In the circumstances, the High Court could issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to their seniority and fitness they should have been promoted on the relevant dates when officers junior to them were promoted. Instead of issuing such a writ, the High Court wrongly issued writs directing the State Government to promote them with retrospective effect. The High Court ought not to have issued such writs without giving the State Government an opportunity in the first instance to consider their fitness for promotion in 1959.

> **Turning now to the next point, while the Tribunal has not rested its decision on the ground that the Selection Committee had not given reasons for not selecting respondent 1 the Tribunal has made a declaration of law to this effect that it was obligatory on the part of the Selection Committee to have recorded the reasons for superseding those who were senior. In the first place, the Tribunal was in error in taking the view that it constituted supersession. The Selection Committee was making a selection and when someone was selected in preference to the other, it could not be said that it amounted to supersession of a junior by a senior. The concept of supersession is relevant in the context of promotion and not in the context of selection. Besides, the Tribunal has also committed an error in taking the view that the law enjoined the Selection Committee to record the reasons and failure to do so would vitiate the selection. It appears that the Tribunal did not properly realise the effect of the relevant provision having been amended at the time when the Selection Committee made its selections and that so far as the amended provision in concerned, the question is concluded by the decision of this Court in R. S. Dass v. Union of India4 wherein this Court, while dealing with the provisions of Indian Administrative Service (Appointment by Promotion) Regulations, 1955 which are in pari materia with Indian Police Service (Appointment by Promotion) Regulations, 1955 applicable in the instant case, has taken the view that it is not necessary to record the reasons for not selecting a person who is in the arena.**

Similarly the Apex Court in ***Sarat Kumar Dash and others Versus Biswajit Patnaik and others,*** 1995 Supp (1) SCC 434 has held that the seniority would have its due place only where the merit and ability are approximately equal or where it is not possible to assess *inter se* merit and the suitability of two equally eligible competing candidates who come very close in the order of merit and ability. But in case where the relative merit and suitability or ability have been considered and evaluated, and

found to be superior, then the seniority has no role to play. Their Lordships have held as under:

> "**In case of merit-cum-suitability, the seniority should have no role to play when the candidates were found to be meritorious and suitable for higher posts. Even a junior-most man may steal a march over his seniors and jump the queue for accelerated promotion. This principle inculcates dedicated service, and accelerates ability and encourages merit to improve excellence. The seniority would have its due place only where the merit and ability are approximately equal or where it is not possible to assess inter se merit and the suitability of two equally eligible competing candidates who come very close in the order of merit and ability. Under those circumstances, the seniority will play its due role and calls it in aid for consideration. But in case where the relative merit and suitability or ability have been considered and evaluated, and found to be superior, then the seniority has no role to play. In our view the PSC has evolved correct procedure in grading the officers and the marks have been awarded according to the grading. It is seen that the four officers have come in the grading of 'B'. In consequence, the PSC had adopted the seniority of the appellants and Panda in the lower cadre in recommending their cases for appointment in the order of merit.**

The Apex Court has held in ***Orissa Small Industries Corporation Limited and another Versus Narasingha Charan Mohanty and others***, (1999) 1 SCC 465 that the courts cannot assess the respective merit of the candidates for adjudicating their suitability for promotion. Their Lordships have held as under:

> **"Promotion to the post of General Manager is governed by Rule 24 of the Employees Service Rules, 1979. Under the said Rule, the Selection Committee is required to recommend the suitable employee for promotion whom they consider fit. Suitability and merit being the criterion for promotion and the respondent having been considered but being found**

> **unsuitable for promotion, the constitutional rights of being considered cannot be said to have been infringed. If the Departmental Promotion Committee has taken into consideration the fact that the respondent has not in fact served as Joint General Manager though he has been given notional promotion to the said post and, therefore, has not gained the necessary experience, it cannot be said that the ground is an extraneous ground for adjudging the suitability of the person for being promoted to the post of General Manager. That apart, the Court is not entitled to assess the respective merit of the candidates for adjudging their suitability for being promoted and the only right the employee has is a right of consideration. The said right of consideration not having been infringed in the present case, the High Court was not justified in issuing the impugned direction for reconsideration of his case. We, accordingly, set aside the impugned judgment of the High Court and hold that the writ petition filed by the respondent stands dismissed. This appeal is allowed but in the circumstances, there will be no order as to costs."**

The Apex Court in ***Badrinath Versus Government of Tamil Nadu and others*** (2000) 8 SCC 395 has held that unless there is a strong case for applying the *Wednesbury* doctrine or there are *mala fides*, Courts and Tribunals cannot interfere with the assessments made by the Departmental Promotion Committee in regard to merit or fitness for promotion. Their Lordships have held as under:

> **"Unless there is a strong case for applying the *Wednesbury* doctrine or there are mala fides, courts and Tribunals cannot interfere with assessments made by Departmental Promotion Committees in regard to merit or fitness for promotion. But in rare cases, if the assessment is either proved to be mala fide or is found based on inadmissible or irrelevant or insignificant and trivial material and if an attitude of ignoring or not giving weight to the positive aspects of one's career is strongly displayed, or if the inferences drawn are such that no reasonable person can reach such conclusions, or if there is**

illegality attached to the decision, then the powers of judicial review under Article 226 of the Constitution are not foreclosed.

While the courts are to be extremely careful in exercising the power of judicial review in dealing with assessment made by Departmental Promotion Committees, the executive is also to bear in mind that, in exception cases, the assessment of merit made by them is liable to be scrutinized by courts, within the narrow *Wednesbury* principles or on the ground of mala fides. The judicial power remains but its use is restricted to rare and exception situations. We are making these remarks so that courts or Tribunals may not – by quoting this case as an easy precedent – interfere with assessment of merit in every case. Courts and Tribunals can neither sit as appellate authorities nor substitute their own views to the views of Departmental Promotion Committees. Undue interference by the courts or Tribunals will result in paralyzing recommendations of Departmental Committees and promotions. The case on hand can be a precedent only rate cases."

In the latest pronouncement, the Hon'ble Supreme Court ***in K.K. Parmar Versus H.C. of Gujarat through Registrar and others,*** 2006 (5) SCC 789 has held that no employee had a claim to the post only on the basis of his seniority and for adjudging the merit past performance was a relevant factor. Their Lordships have held as under:

"Insofar as the second contention raised on behalf of the appellants is concerned, apparently the same has merit. Merit was the only consideration for promotion to the post of Section Officer. They were selection posts. Selection was, therefore, required to be made strictly on the basis of respective merit of the candidates as also on the basis of their past performance. No employee had a claim to those posts only on the basis of their seniority."

The case of the petitioner had been duly considered by the Departmental Promotion Committee in accordance with law and the

Departmental Promotion Committee has taken into consideration the entire service profile of the petitioner. This Court will not interfere with recommendations made by the Departmental Promotion Committee.

The post of Additional DIG is a selection post and the same was to be filled up on the basis of merit. The benchmark prescribed qua filling up the post by way of promotion to the post of Additional DIG is “very good”. The petitioner had failed to achieve this benchmark though his case was duly considered by the Departmental Promotion Committee. There is no force in the submission of Mr. Kaundal that persons junior to the petitioner have been promoted. The question of supersession arises only when the post is a non-selection post and the same has to be filled up on the basis of seniority.

Consequently there is no merit in the petition and the same is dismissed with no order as to costs.

(Rajiv Sharma), Judge

August 13, 2007
Awasthi